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## PEMUNGUT DUTI SETEM v. HAVI LOGISTICS (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
CHE MOHD RUZIMA GHAZALI JCA
AZIZUL AZMI ADNAN JCA
B [CIVIL APPEAL NO: W-01(A)-488-07-2022]
16 OCTOBER 2023

**Abstract** – *Considering that the terms of the asset purchase agreement provide that, as at closing, the title to and risk of the assets acquired under the agreement will automatically pass to the purchaser, by way of a deeming provision, the agreement is a 'conveyance on sale'. Being a 'conveyance on sale', the said agreement is dutiable with stamp duty on an ad valorem basis pursuant to item 32 to the First Schedule of the Stamp Act 1949.*

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***CIVIL PROCEDURE:*** *Appeal – Appeal against decision of High Court – High Court held asset purchase agreement ('agreement'), in respect of assessment of stamp duty, be assessed in accordance with item 4 to First Schedule of Stamp Act 1949 ('Act') – Whether stamp duty ought to be assessed pursuant to s. 21(1) read together with item 32 to First Schedule of Act – Whether agreement 'conveyance on sale' – Whether fixed assets sold under agreement fell within expression 'goods' under s. 21(1) of Act, hence exempted from imposition of stamp duty on ad valorem basis*

***REVENUE LAW:*** *Stamp duty – Assessment – Whether asset purchase agreement ('agreement') ought to be assessed pursuant to s. 21(1) read together with item 32 to First Schedule of Stamp Act 1949 ('Act') or item 4 to First Schedule of Act – Whether agreement 'conveyance on sale' – Whether fixed assets sold under agreement fell within expression 'goods' under s. 21(1) of Act, hence exempted from imposition of stamp duty on ad valorem basis*

***STATUTORY INTERPRETATION:*** *'goods' – Stamp Act 1949, s. 21(1) – Whether fixed assets sold under asset purchase agreement fell within expression 'goods', hence exempted from imposition of stamp duty on ad valorem basis*

Pursuant to an asset purchase agreement ('agreement'), the respondent had agreed to purchase certain assets and liabilities ('acquired assets') from Martin Brower Sdn Bhd ('Martin Brower'). The agreed purchase price for the acquired assets, as stipulated under the agreement, was USD2,491,491.55 excluding goodwill. Regarding the assessment of stamp duty, the appellant assessed the agreement with *ad valorem* duty in the amount of RM399,196 pursuant to item 32 to the First Schedule of the Stamp Act 1949 ('Act'). The assessed amount, however, was not agreed to by the respondent. According

to the respondent, the agreement should have been assessed as an agreement under item 4 to the First Schedule of the Act, to which the payable amount should only be RM10. Therefore, by virtue of s. 39 of the Act, the respondent filed an appeal against the appellant's decision by way of a case stated. At the High Court, the High Court Judge agreed with the respondent's contention and held that the agreement ought to have been assessed pursuant to item 4 to the First Schedule of the Act. Hence, the present appeal. The ground for the appeal was that the stamp duty for the agreement should have been assessed in reference to s. 21(1) of the Act read together with item 32(a) to the First schedule of the same Act. Hence, the issues that arose were: (i) whether the property in the acquired assets passed to the respondent by the agreement (in which case it was a 'conveyance on sale' within the meaning of the Act chargeable with *ad valorem* duty) or whether some other act was required in order to effect the delivery of the acquired assets; and (ii) whether the fixed assets (part of the acquired assets) sold under the agreement fell within the expression 'goods' as mentioned under s. 21(1) of the Act, thus, exempted from the operation of the said section and became non-dutiable on an *ad valorem* basis.

**Held (allowing appeal)**
**Per Azizul Azmi Adnan JCA delivering the judgment of the court:**

**(1)** Clause 2.3(c)(i) of the agreement provided that as at the closing of the agreement, title to and risk in the acquired assets passed automatically by way of a deeming provision, and such assets were deemed delivered where they were located. The agreement did not contemplate any separate act to be undertaken by the parties for the transfer of legal title. For this reason, the agreement ought to be the instrument by which title to the acquired assets passed. The agreement supported no other reasonable construction. That being the case, the agreement constituted a 'conveyance of sale' within the meaning of the Act and would be dutiable pursuant to item 32(a) to the First Schedule of the Act. Hence, the appeal was allowed. (paras 28 & 29)

**(2)** The ordinary meaning of 'goods' referred to tangible property. Black's Law Dictionary defined it as 'tangible or movable personal property other than money'. By this definition, the court failed to see how the expression could be read down to refer only to goods held as current assets or inventory in the accounts of a company. Section 21(1) of the Act is of a general application. There is nothing in it that suggests that a distinction should be drawn between the treatment of assets held as capital goods on the one hand, and assets held as inventory on the other. The Oxford English Dictionary, which was cited by the appellant, did not advance its case, for it defined goods variously as 'property' and 'merchandise, wares'. The court saw no reason why Parliament would have intended the latter meaning over the former. Other than that, the

appellant also posited the position that the expression 'goods' must be read *ejusdem generis* with 'wares or merchandise', and therefore must mean such goods that are held for future sale and does not include goods that are capital in nature. The appellant, however, was unable to cite any authority in support of this position. (paras 51-54)

**(3)** Based on *Drages v. Commissioners of Inland Revenue,* it was apparent that the Commissioners of Inland Revenue of the UK, in implementing s. 59 of the Stamp Act 1891, did not discriminate between goods held as inventory or stock and goods that were capital in nature (such as motor lorries and office furniture). All of these were treated as coming within the exception of 'goods, wares or merchandise'. For this reason, the court was fortified with the view that the fixed assets sold under the agreement came within the meaning of 'goods' as mentioned under s. 21(1) of the Act. Accordingly, the consideration paid for the fixed assets would not be dutiable on an *ad valorem* basis, by reason solely of s. 21(1) of the Act. (paras 61 & 62)

**Case(s) referred to:**

*BASF Services (M) Sdn Bhd v. Pemungut Duti Setem [2010] 5 CLJ 109 FC* ***(refd)***
*Drages v. Commissioners Of Inland Revenue [1927] 46 TC 389* ***(foll)***
*Farmer & Co v. IRC [1898] 2 QB 141* ***(refd)***
*IRC v. Angus [1889] 23 QBD 579* ***(refd)***
*Littman v. Barron [1951] 2 All ER 393* ***(refd)***
*Oughtred v. IRC [1960] AC 206* ***(refd)***
*Prudential Assurance v. IRC [1992] STC 863* ***(refd)***
*Ridge Nominees v. IRC [1961] 2 All ER 354* ***(refd)***
*UMBC v. Pekeliling Triangle Sdn Bhd [1991] 2 CLJ 1470; [1991] 1 CLJ (Rep) 474 SC* ***(refd)***

**Legislation referred to:**

Stamp Act 1949, ss. 2, 4(1), 21(1), 39, First Schedule, item 4, 32(a), (e)

Customs and Inland Revenue Act 1889 [UK], s. 18
Stamp Act 1870 [UK], s. 70
Stamp Act 1891 [UK], ss. 54, 59

*For the appellant - Normareza Mat Rejab, Mohammad Hafidz Ahmad & Syazana Safiah Rozman; SRC*
*For the respondent - S Saravana Kumar, Hanina Mohd Azham & Daniel Annamalai; M/s Raj Ong & Yudistra*

*[Editor's note: For the High Court judgment, please see Havi Logistics (M) Sdn Bhd v. Pemungut Duti Setem [2022] 1 LNS 2617 (overruled).]*

*Reported by Syamim Ariffin*

## JUDGMENT

**Azizul Azmi Adnan JCA:**

### Introduction

**[1]** The respondent plaintiff, Havi Logistics (M) Sdn Bhd, entered into an asset purchase agreement with Martin Brower Sdn Bhd to purchase certain assets and liabilities. The purchase price under the asset purchase agreement for the assets that were acquired under the agreement (defined in the agreement as "acquired assets") was USD2,491,491.55. The terms of the purchase specifically excluded goodwill.

**[2]** The asset purchase agreement was assessed by the Collector of Stamp Duty with *ad valorem* duty in the amount of RM399,196, based on item 32 of the First Schedule of the Stamp Act 1949. The respondent appealed to the High Court by way of a case stated pursuant to s. 39 of the Stamp Act 1949.

*At The High Court*

**[3]** The respondent was of the view that the asset purchase agreement ought to have been assessed as an agreement under item 4 of the First Schedule of the Stamp Act 1949, under the terms of which duty of only RM10 was payable.

**[4]** The learned High Court Judge hearing the matter agreed with counsel for the respondent, holding that the stamp duty on the asset purchase agreement ought to have been assessed under item 4 of the First Schedule. The relevant portion of the grounds of judgment of the court below stated as follows:

> [48] On a plain reading of Item 4, First Schedule of the SA, this Court finds that the Plaintiff has fulfilled all the requirements stipulated thereunder. The Agreement clearly fell within the ambit of item 4, First Schedule of the SA. Therefore, the stamp duty on the Agreement should be assessed under the same Item.
>
> Conclusion
>
> [49] Premised on the reasons alluded to in the above, the Plaintiff's application was allowed with costs.

*This Appeal*

**[5]** The Collector of Stamp Duty appealed to this court against the determination of the High Court. The decision of the court below was assailed on the grounds that the applicable provision ought to have been s. 21(1) of the Stamp Act 1949, read together with item 32 of the First Schedule.

**[6]** We allowed the appeal, but for different grounds than that advanced by revenue counsel. Our reasons are set out here.

A **The Material Provisions Of The Asset Purchase Agreement**

**[7]** It will be necessary for the purposes of this judgment that the material provisions of the asset purchase agreement be borne in mind. These are set out in the following paragraphs.

B **[8]** The principal operative clauses in the asset purchase agreements are cls. 2.1(a) to (c), which provides for the specific assets to be acquired and liabilities to be assumed. They read as follows:

> **2.1 Acquired Assets and Assumed Liabilities.**
>
> C (a) Subject to and in accordance with the terms of this Agreement, the Seller hereby sells, transfers, conveys, assigns and delivers to the Purchaser, and the Purchaser hereby purchases from the Seller at the Closing, all of the Seller's right, title and interest in and to the Acquired Assets.
>
> (b) Subject to and in accordance with the terms of this Agreement, the D Purchaser hereby assumes as of and following the Closing, all of the Assumed Liabilities.
>
> (c) Notwithstanding anything to the contrary herein, the Excluded Assets are excluded from the sale and purchase herein and shall be retained by the Seller.

E **[9]** The expression "acquired assets" has been further defined in cl. 1.1 as the business assets of Martin Brower Sdn Bhd (as the seller) that are specified in Schedules 1 and 3 to the asset purchase agreement. Schedule 1 specifies a listing of fixed assets and also refers to the inventory of the seller (which was to be determined as of the date of completion of the asset F purchase agreement). Schedule 3 lists out a number of business contracts. As can be seen in cl. 2.1(b), the respondent as buyer has agreed to assume the liabilities under those same business contracts.

**[10]** As explained above, the asset purchase agreement specifically excluded from its scope any goodwill from the business of the seller.

G **[11]** The consideration payable was specified under cl. 2.2(a) of the asset purchase agreement, which reads as follows:

> 2.2 Purchase Price
>
> (a) The purchase price for the Acquired Assets (save for Inventory which H shall be dealt with in Clause 2.2(c)) of this Agreement and Assumed Liabilities is USD $2,491,491.55 ("Purchase Price") payable in cash by the Purchaser on Closing to the Seller or as directed by the Seller.

**[12]** There appears to be a minor discrepancy between cl. 2.2(a) and Schedule 1. The former specifies the amount of USD2,491,491.55 to be I payable for the fixed assets and the rights under the business contracts, whereas Schedule 1 states that this consideration was payable in respect of

the fixed assets only. Be that as it may, this discrepancy was not material to the outcome of the case, as the appellant took the view that *ad valorem* duty ought to be assessed on the whole amount of the consideration.

**[13]** The assets that were acquired and liabilities assumed pursuant to the asset purchase agreement may thus be summarised as follows:

| Asset/Liability | Consideration |
|---|---|
| Fixed Assets | USD2,491,491.55 |

| Asset/Liability | Consideration |
|---|---|
| Inventory | Determined by reference to book value as at the completion date of the asset purchase agreement |
| Business Contracts | - |

**[14]** The position taken by the appellant was that the duty on the asset purchase agreement ought to be assessed on the consideration payable for the fixed assets, pursuant to s. 21(1) of the Stamp Act 1949, read together with item 32(a) of the First Schedule to that Act. The appellant conceded that "inventory" was specifically exempt by virtue of the exception to s. 21(1).

**[15]** For the purposes of assessing stamp duty, it is important to have particular regard to the completion clauses applicable to the disputed asset class. This is because duty is assessed on instruments of conveyance. Hence, the key and often determinative question to be answered is whether the assets in question are transferred by the instrument itself, or whether some other act is necessary for property in the assets or goods to pass to the purchaser. The completion clause in respect of the acquired assets is set out in cl. 2.3(c)(i), which reads as follows:

> **2.3 Closing**
>
> ...
>
> (c) As of and at Closing:
>
> (i) title to the Acquired Assets and all risk of loss as to the Acquired Assets shall be deemed to have passed to the Purchaser and deemed delivered at the place at which the Acquired Assets are located; and

**[16]** It may be observed that the asset purchase agreement did not contemplate any further act to be carried out; the property and risk in the acquired assets passed at closing (*ie*, completion) by way of a deeming provision.

A **Analysis And Decision**

*Summary*

**[17]** The issue turned upon the proper construction of the asset purchase agreement and whether the property in the acquired assets passed to the B respondent by the asset purchase agreement (in which case it was a "conveyance on sale" within the meaning of the Stamp Act 1949 chargeable with *ad valorem* duty) or whether some other act was required in order to effect delivery of the acquired assets.

**[18]** On the facts of the case, due to the deeming provision in cl. 2.3(c)(i) C of the asset purchase agreement, the agreement was the instrument by which title to the acquired assets passed. As such, the asset purchase agreement constituted a conveyance on sale within the meaning of the Stamp Act 1949 and would be dutiable pursuant to item 32(a) of the First Schedule.

**[19]** The fixed assets sold under the asset purchase agreement in the present D case came within the meaning of "goods" in s. 21(1) of the Stamp Act 1949. Accordingly, the consideration paid for the fixed assets would not attract *ad valorem* duty, by reason solely of the operation of s. 21(1). Nonetheless, because the asset purchase agreement constituted a "conveyance on sale" of the acquired assets, *ad valorem* duty was chargeable under item 32(e) of the E First Schedule of the Stamp Act 1949.

**[20]** These findings are explained in detail in the following paragraphs.

*Conveyance On Sale*

**[21]** As explained above, duty is payable on instruments, and not F transactions, and then only if the instrument in question has the effect of conveying property in, title to or any interest in, the assets, goods or other property that is the subject matter of the instrument. I can do no better than to reproduce the following excerpt from the judgment of the Federal Court in *BASF Services (M) Sdn Bhd v. Pemungut Duti Setem* [2010] 5 CLJ 109:

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> Section 4 of the Act is the starting point of this appeal, as it promulgates that subject to the exemptions in the Act and any written law in force, instruments specified in the First Schedule shall be chargeable with several duties specified in that Schedule. As a precursor, there must be an instrument, specifically a document, before duty arises. It follows that the H transfer of a chattel, by way of physical delivery unless disallowed by some law, is itself not chargeable to any duty (*Cohen & Moore v. IRC* [1933] 2 KB 126). It must be understood that the expression 'conveyance on sale' does not mean a conveyance where a definite contract of purchase and sale preceding it exists, but means the same as if it was upon a contract of purchase and sale. In *Great Western Railway v. The Commissioners of Inland* I *Revenue* [1894] 1 QB 512, two railway companies were amalgamated to Great Western Railway by an Act of Parliament. It provided that a copy of the Act was to be chargeable with the same stamp duty, as would have

been chargeable had the transaction effected by the Act been effected by an executed instrument. Here the shareholders of one company received stocks of Great Western Railway Company, whilst for the other company Great Western Railway Company paid the shareholders the principal and interest of certain outstanding debentures. The court held that the transaction by the amalgamation was effected was in substance a transfer on sale. That being so, the stocks received, and the payment of the debenture debt were subject to *ad valorem* stamp duty. Here the copy of the Act was the instrument that was chargeable.

**[22]** Thus the starting position must be s. 4(1) of the Stamp Act 1949, which provides as follows:

Section 4. Instruments chargeable with duty.

(1) Subject to this Act and subject to the exemptions contained in this Act and in any written law for the time being in force, the several instruments specified in the First Schedule shall, from and after the commencement of this Act, be chargeable with the several duties specified in such Schedule.

**[23]** Item 32(a) of the First Schedule provides for *ad valorem* duty to be payable in respect of a "conveyance, ... transfer ... on sale of any property (except stock, shares, marketable securities and accounts receivable or book debts ...)".

**[24]** The expression "conveyance on sale" is further defined in s. 2 in the following manner:

conveyance on sale includes every instrument and every decree or order of any Court, whereby any property, or any estate or any interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction.

**[25]** The definition makes it clear that an instrument by which property or any interest therein is transferred on the sale of such property or interest would be regarded as a conveyance on sale. This definition of conveyance on sale is in *pari materia* with s. 54 of the Stamp Act 1891 of England & Wales, upon which our Act is based. Hence, cases decided under the English provision will be highly persuasive.

**[26]** In *Oughtred v. IRC* [1960] AC 206, Lord Denning explained the effect of s. 54 in the following terms:

In my opinion, every conveyance or transfer by which an agreement for sale is implemented is liable to stamp duty on the value of the consideration ... Suffice it that the instrument is the means by which the parties choose to implement the bargain they have made. It is then a "conveyance or transfer on sale" of any property-which I take to mean a conveyance or transfer consequent upon the sale of any property and in implementation of it.

**[27]** In our considered view, the issue turns upon the proper construction of the asset purchase agreement and whether the property in the acquired assets passed to the respondent by the asset purchase agreement (in which case it was a "conveyance on sale" within the meaning of the Stamp Act 1949 chargeable with *ad valorem* duty) or whether some other act was required in order to effect delivery of the acquired assets.

**[28]** Clause 2.3(c)(i) provides that as at closing, title to and risk in the acquired assets passed automatically by way of a deeming provision, and such assets were deemed delivered where they are located. The asset purchase agreement did not contemplate any separate act to be undertaken by the parties for the transfer of legal title. For this reason, the asset purchase agreement must be the instrument by which title to the acquired assets passed. The agreement supported no other reasonable construction.

**[29]** That being the case, the asset purchase agreement constituted a conveyance on sale within the meaning of the Stamp Act 1949 and would be dutiable pursuant to item 32(a) of the First Schedule. For this reason, we must allow the appeal by the Collector of Stamp Duty.

**[30]** It will not have escaped the attentive reader that, had the closing provisions in cl. 2.3(c)(i) not relied upon a deeming provision, but simply stated that the property and risk in the acquired assets passed to the respondent (as purchaser) upon its taking physical possession of such assets, then it would have been abundantly clear that the asset purchase agreement would not have constituted an instrument of conveyance which was subject to *ad valorem* duty.

**[31]** Is it fair and just that such a minor slip of the draftsperson's pen might have such a material effect in monetary terms? In stamp duty cases, the form of words employed must be considered along with the commercial substance of the sale. The duty of the court is explained by Sir Donald Nicholls VC in *Prudential Assurance v. IRC* [1992] STC 863 in the following terms:

> I must ... identify what was the subject matter of the sale. In so doing I must have regard to the commercial substance of the transaction. I must also have regard to the shape, or form, which the parties have chosen for their transaction. A given commercial result can often by reached by more than one route. If the parties have genuinely chosen one route, with the legal incidents and consequences attendant on that route, rather than a different route having different legal incidents and consequences, for better or for worse stamp duty will be assessable accordingly.

**[32]** It follows therefore that this court must properly construe not just the commercial effect sought to be achieved by the parties but also the precise language employed by the parties in the asset purchase agreement. In the course of oral submissions, Mr Saravana for the respondent sought to argue that, because the passing of title and risk occurs not upon the execution of the asset purchase agreement but rather sometime later at its completion, the

asset purchase agreement cannot be considered to be a conveyance on sale. We regret that this proposition finds no support whether in principle or authority. If this were correct, then every instrument of sale would avoid *ad valorem* duty by the simple expedient of providing for deferred completion. In *Ridge Nominees v. IRC* [1961] 2 All ER 354, it was held that an instrument of conveyance would be dutiable even though it was expressed to be subject to certain conditions and may never be completed.

**[33]** The analyses thus far set out in these grounds would have been sufficient to have disposed of the appeal. We are nonetheless of the view that we ought to address s. 21(1) of the Stamp Act 1949, as its proper construction potentially may have far-reaching consequences.

*Section 21(1) Of The Stamp Act 1949*

**[34]** In the course of oral submissions, it was advanced for the appellant that s. 21(1) applied on the facts of the present case to make the asset purchase agreement dutiable as though it were a conveyance on sale, even if no property or any interest in the property was transferred or conveyed by the asset purchase agreement. According to Senior Revenue Counsel, an agreement to sell an asset, for example, would attract *ad valorem* duty under item 32(a) even if title to the assets was to be passed, by the proper construction of the agreement, by the taking of physical possession of the asset.

**[35]** Section 21(1) reads as follows:

> **Certain contracts to be chargeable as conveyances on sale**
>
> 21(1) In any contract or agreement made in Malaysia under seal or under hand only, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of Malaysia, or goods wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share or property of or in any vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on the sale of the estate, interest or property contracted or agreed to be sold.

**[36]** Section 21(1) is in *pari materia* with s. 59 of the English Stamp Act 1891.

**[37]** The first observation that may be made is that s. 21(1) applies to two categories of contracts or agreements: first, a contract or agreement for the sale of any equitable estate or equitable interest in any property; second, a contract or agreement for the sale of any legal estate or legal interest in any property. A further observation is that the exceptions – lands, tenements *etc*, – only apply to the second category of contracts and agreements: see *Farmer & Co v. IRC* [1898] 2 QB 141. Thus, for example, an agreement executed in

Malaysia for the sale of an equitable interest of a property located outside Malaysia would be subject to *ad valorem* duty, whereas an agreement executed in Malaysia for the sale of a legal title or interest in a property located overseas would not be.

**[38]** Sergeant and Sims on Stamp Duty explain that this provision was first enacted as s. 18 of the Customs and Inland Revenue Act 1889, in response to the decision in *IRC v. Angus* [1889] 23 QBD 579.

**[39]** *IRC v. Angus* was decided under s. 70 of the Stamp Act 1870. The fact of that case was that a company and its liquidators had entered into a contract to sell all the company's assets and business, including goodwill, to a new company. The case stated recited the scope of the contract in the following terms:

> That the old company and its liquidators should sell and the new company should purchase the freehold lands, buildings, and hereditaments, and the goods, chattels, &c., of the old company, and the undertaking, business and goodwill thereof, and all other the real and personal property of the old company, &c.

**[40]** The Commissioners of Inland Revenue were of the view that the transfer of goodwill was subject to *ad valorem* duty, whereas the other matters other than goodwill were chargeable under the head of "deed" with duty of ten shillings.

**[41]** At first instance, the Queen's Bench Division held that the contract did not convey whether legally or equitably the property comprised in the goodwill, but that there was merely a legal and equitable right to enforce the conveyance upon fulfilment of the conditions precedent, which in turn meant that the contract in question did not attract *ad valorem* duty.

**[42]** On appeal, it was argued before the Court of Appeal that goodwill was transferred by the instrument – the contract operated as an equitable transfer of the goodwill, and hence the instrument in question attracted *ad valorem* duty.

**[43]** The Court of Appeal took the view that the contract was not a conveyance – it was merely a specifically enforceable contract to convey the goodwill, and thus was not subject to *ad valorem* duty.

**[44]** The legal position following the decision in *IRC v. Angus* saw the enactment of s. 59. However, the concept of a "conveyance on sale" was not abrogated altogether, as it was re-enacted in s. 54 of the Stamp Act 1891. The following table sets out the relevant sections for ease of comparison.

| Stamp Act 1870 | Stamp Act 1891 |
|---|---|
| Section 70<br><br>The term 'conveyance on sale' includes every instrument and every decree or order of any Court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf or by his direction. | Section 54<br><br>For the purposes of this Act the expression "conveyance on sale" includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.<br><br>Section 59(1)<br><br>Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate outside of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or any vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on the sale of the estate, interest or property contracted or agreed to be sold. |

**[45]** The first point to appreciate is the change in the wording employed in s. 54 from the old s. 70: there is no longer any reference to a legal or equitable transfer or vesting. This was to address the doubt expressed by the Court of Appeal in *IRC v. Angus* that there could exist an equitable transfer of a legal right, or a legal transfer of an equitable right. With the change in law, it does not matter whether the transfer operated at law or in equity; what matters is that the provision covered both legal and equitable estates and interests in property.

**[46]** More significant is the introduction of s. 59. On its plain reading, it removes the previous requirement that an instrument must operate to convey or transfer property before it becomes chargeable with *ad valorem* duty. The net is now cast wider, to encompass all contracts for the sale of an estate or interest in property, regardless of whether such contract operates as an instrument of conveyance. Where however the contract relates to the sale of a legal estate or interest, there are exceptions for certain classes of property, namely real property, tenements, hereditaments, heritages, property located outside the jurisdiction, goods, wares or merchandise, stock, marketable securities, ships and vessels. For these classes of assets exempt from the operation of s. 59, s. 54 applies. Thus, a contract for the sale of goods would only be dutiable *ad valorem* if it operated as a conveyance on sale.

**[47]** As explained previously, s. 59 of the English Stamp Act 1891 is in *pari materia* with s. 21(1) of our Stamp Act 1949. Furthermore, the s. 2 definition of "conveyance on sale" in our Act also closely mirrors s. 54 of the Stamp Act 1891. That this is so can be demonstrated by a side-by-side comparison of the provisions.

| **Stamp Act 1949** | **Stamp Act 1891** |
|---|---|
| Section 2<br>In this Act, unless the context otherwise requires –<br>...<br>... "conveyance on sale" includes every instrument and every decree or order of any Court, whereby any property, or any estate or any interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction. | Section 54<br>For the purposes of this Act the expression "conveyance on sale" includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction. |

| Section 21(1) | Section 59(1) |
|---|---|
| Any contract or agreement made in Malaysia under seal or under hand only, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate outside of Malaysia, or goods, wares or merchandise, or stock, or marketable securities, or any ship or any vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on the sale of the estate, interest or property contracted or agreed to be sold. | Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate outside of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or any vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on the sale of the estate, interest or property contracted or agreed to be sold. |

*The Meaning Of "Goods"*

**[48]** Returning now to the facts of the present case, the appellant sought to make *ad valorem* duty payable pursuant to s. 21(1) on the transfer to the respondent of the physical assets that previously belonged to Martin Brower Sdn Bhd. The position taken by the appellant was that these physical assets did not come within the expression "goods, wares or merchandise" specifically excluded from the operation of s. 21(1). Senior Revenue Counsel argued that the expression "goods, wares or merchandise" was only intended to cover stock-in-trade, or assets held as inventory. According to counsel, other capital assets – such as tables, chairs and computer equipment – came within the scope of s. 21(1) and thus the instrument documenting their sale was dutiable as though it were a conveyance on sale regardless of whether such assets were transferred by the instrument in question.

**[49]** We were unable to agree.

**[50]** It is well-settled that statutes that impose any tax, duty levy or charge are to be read strictly, with any ambiguity to be construed in favour of a taxpayer. This principle of construction applies with equal force in respect of the Stamp Act 1949: see the decision of the Supreme Court in *UMBC v. Pekeliling Triangle Sdn Bhd* [1991] 2 CLJ 1470; [1991] 1 CLJ (Rep) 474; [1991] 2 MLJ 559. Where, however, the provision to be construed is one

A that provides relief to the taxpayer (rather than one that imposes upon the taxpayer a tax), the foregoing principle does not apply. In the English Court of Appeal case of *Littman v. Barron* [1951] 2 All ER 393, Cohen LJ held that:

> [T]he principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a
B taxpayer relief in certain cases from a section clearly imposing liability.

**[51]** We are of the considered view that the exceptions in s. 21(1) – while not providing relief *per se* – ought to be construed in accordance with the general principles of statutory interpretation. The court is to give the words in the statute their ordinary meaning. In discovering the true intention of
C Parliament, the court is under a duty to adopt an approach that promotes the purpose or object underlying the particular statute.

**[52]** The ordinary meaning of "goods" refers to tangible property. Black's Law Dictionary defines it as "tangible or movable personal property other than money". By this definition, we fail to see how the expression can be
D read down to refer only to goods held as current assets or inventory in the accounts of a company. Section 21(1) is of general application, and nothing in it suggests that a distinction should be drawn between the treatment of assets held as capital goods on the one hand, and assets held as inventory on the other.

E

**[53]** The Oxford English Dictionary, which was cited by Senior Revenue Counsel, did not advance her case any further, for it defines a good variously as "property" and "merchandise, wares". We saw no reason why Parliament would have intended the latter meaning over the former.

F **[54]** It was also advanced for the appellant that the word "goods" must be read *ejusdem generis* with "wares or merchandise", and therefore must mean such goods that are held for future sale, and does not include goods that are capital in nature. Revenue Counsel was unable, however, to cite any authority in support for this position.

G **[55]** It initially appeared to us that the dearth of authority was anomalous, given that the provision in question is well into its second century of existence, and that it operates in a litigious area of the law.

**[56]** A thorough examination of the case law has however explained why.
H The reason is that the taxing authorities in the United Kingdom have always taken a more expansive reading of the expression "goods", and have not limited this exception in s. 59 to only inventory or stock-in-trade.

**[57]** In the case of *Drages v. Commissioners of Inland Revenue* [1927] 46 TC 389, a new company entered into an agreement to acquire the business of an
I older company. It was argued by the appellant company that the transaction was one of an agreement for the sale of an estate or interest in goods, wares

or merchandise, and as such, the consideration came within the exceptions under s. 59 of the Stamp Act 1891, or that alternatively the duty payable should exclude the consideration payable for any interest in goods.

**[58]** The terms of the agreement specifying the nature of the assets to be acquired was explained in the case stated in the following terms:

> [I]t was agreed that the vendors should sell, and the Appellants should purchase, as and from 1st January 1926:
>
> > First the goodwill of the said business with the right so far as the vendors were able to confer the same to use the name "David Drage & Sons" and/or Drage as part of the name of the Appellants and represent the Appellants as Carrying on such business in continuance of the vendors and in succession thereto and all trade marks connected therewith
> >
> > Secondly all the freehold and leasehold hereditaments belonging to the vendors and used by them in connection with the said business
> >
> > Thirdly all the motor lorries, vans and motor cars valued by Dennis Bros. Ltd. on 30th January 1926, and all the plant, machinery, office furniture, patents, licences, stock-in-trade, implements and utensils to which the vendors were entitled in connection with the said business
> >
> > Fourthly the full benefit of all pending contracts, engagements and orders in connection with the said business
> >
> > Fifthly all cash in hand and at the bank and all bills and notes of the vendors in connection with the said business
> >
> > Sixthly all other property to which the vendors were entitled in connection with the said business, including the hire-purchase balances belonging to the vendors in connection with the said business on 31st December 1925 but excluding all book and other debts.

**[59]** It can be seen from the terms of the agreement that what was to be acquired included both capital goods (plant, machinery, office furniture, implements and utensils) as well as inventory (described as stock-in-trade).

**[60]** The sole issue before the court was whether the benefit of hire-purchase agreements entered into with customers was an interest in goods. More pertinent for our present purposes is the following passage from the case stated:

> 9. **No claim for *ad valorem* duty was made by the Commissioners in respect of** the first six of these items, *viz*. the freehold and leasehold premises, fixtures and fittings, **the stock, the motor lorries, stationery, catalogues, *etc***, and the payments in advance and cash, but they assessed the agreement for sale to *ad valorem* duty on the aggregate of the two sums of £430,067 and £95,545 mentioned above, amounting together to

> £525,612, being of opinion that no portion of these two sums aggregating £525,612 was attributable to assets agreed to be sold which fell within any of the exceptions in s. 59(1) of the Stamp Act 1891. They accordingly assessed the agreement for sale with the duty of £5,256 10s. *ad valorem* duty under the provisions of the aforesaid section and s. 73 of the Finance (1909-10) Act 1910, and also with the fixed duty of 10s. as a "Deed of any kind whatsoever not described in this Schedule" (*ie*, Sch. 1 to the Stamp Act 1891) in respect of its operation as an agreement under seal for sale of the property on the apportioned consideration for which *ad valorem* duty was not payable under s. 59(1) of the Stamp Act 1891.
>
> (emphasis added)

**[61]** It is thus apparent that the Commissioners of Inland Revenue of the UK, in implementing s. 59 of the Stamp Act 1891, did not discriminate between goods held as inventory or stock, and goods that were capital in nature (such as motor lorries and office furniture). They treated all of these as coming within the exception of "goods, wares or merchandise". This then is the reason why no dispute has ever arisen in the corpus of legal precedent as to whether "goods" in s. 59 was limited only to inventory or stock-in-trade.

**[62]** For this reason, we were fortified in our view that the fixed assets sold under the asset purchase agreement in the present case came within the meaning of "goods" within the meaning of s. 21(1) of the Stamp Act 1949. Accordingly, the consideration paid for the fixed assets would not be dutiable on an *ad valorem* basis, by reason solely of s. 21(1). Nonetheless, the asset purchase agreement constituted a "conveyance on sale" of the fixed assets, because – as explained at paras. [28] and [29] ante – the property in the fixed assets passed to the respondent by the asset purchase agreement without the need for any further act to be taken by the parties to the agreement.

*Summary Of The Applicable Principles*

**[63]** We summarise the applicable principles as follows:

(i) the first step in assessing the duty payable in respect of an agreement for the sale of the property is to determine whether the sale relates to an equitable estate or equitable interest in the property. If it is, then the duty payable would be at the *ad valorem* rate specified under item 32 of the First Schedule;

(ii) if, on the other hand, the agreement relates to a sale of a legal estate or legal interest in the property, then it must be ascertained if any of the exceptions in s. 21(1) apply. If they do not, then duty would be payable *ad valorem* pursuant to item 32 of the First Schedule;

(iii) if however the sale relates to legal estate or legal interest in the property, and the property in question comes within one of the exceptions in s. 21(1), the next question to be asked is whether the agreement or contract in question is a conveyance on sale. Does property in assets pass to the purchaser by virtue of the agreement or contract in question? If so, then duty would be payable *ad valorem* pursuant to item 32 of the First Schedule;

(iv) if, on the other hand, one of the exceptions applies and the agreement is on its proper construction not a conveyance on sale, then the agreement or contract ought to be stamped as an "agreement" pursuant to item 4 of the First Schedule of the Stamp Act 1949.